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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF MISSOURI, *et al.*,

Petitioners,

—v.—

KALIMA JENKINS, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF WESTERN MISSOURI, THE AMERICAN JEWISH CONGRESS, THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE NATIONAL WOMEN'S LAW CENTER, AND THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Western Missouri is its local affiliate with offices in Kansas City, Missouri. The ACLU and its affiliates have been deeply involved in the effort to desegregate America's schools and to remove the vestiges of prior, *de jure* segregation. As part of that ongoing effort, the ACLU served as counsel in *Freeman v. Pitts*, 503 U.S. __, 112 S.Ct. 1430 (1992), this Court's most recent school desegregation decision.

The American Jewish Congress (AJC) is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews. Beginning long before *Brown v. Board of Education*, AJC has participated in cases involving the desegregation of the nation's public schools.

The Asian American Legal Defense and Education Fund (AALDEF) is a nonprofit civil rights organization dedicated to defending the rights of Asian Americans through litigation, community education, and advocacy to shape public policy in the areas of voting rights, immigrants' rights, employment and labor rights, and environmental justice. AALDEF currently represents victims of anti-Asian violence and Japanese Americans who were incarcerated in U.S. camps during World War II.

The National Women's Law Center (Center) is a nonprofit legal advocacy organization dedicated to the ad-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

vancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life, with a special emphasis on promoting equal opportunity of education for girls and women. Since 1972, the Center has actively participated in litigation to secure the rights of women and has participated in major Supreme Court cases addressing women's right to equal protection under the law.

The Puerto Rican Legal Defense and Education Fund (PRLDEF) exists to ensure that every Puerto Rican and other Latino is guaranteed the opportunity to succeed. Through advocacy, education and litigation, PRLDEF seeks to secure and safeguard the political, economic, social and legal rights of our community. We will succeed when Latinos enjoy full and equal participation in American society. Over the 22 years since its founding PRLDEF has initiated hundreds of cases to combat discrimination in education, voting rights, employment and housing. PRLDEF has successfully argued landmark cases including several in the United States Supreme Court.

STATEMENT OF THE CASE

An historical context is necessary to understand the current posture of this case. In 1984, the district court held that the respondent Kansas City, Missouri School District (KCMSD) and the petitioner State of Missouri (Missouri) were liable for segregation in KCMSD. *Jenkins v. Missouri*, 593 F.Supp. 1485 (W.D.Mo. 1984). In discussing the racial composition of the schools within KCMSD, the district court found that "vestiges of [the former] dual system still remain." *Id.* at 1493. Of particular relevance here, the court found that "the inferior education indigenous of the state-compelled dual school system has lingering effects in [KCMSD]." *Id.* at 1492. Not surprisingly, the district court

also found that this "inferior education" had "produced low achievement." *Id.* Each of these findings was supported by specific evidence in the record. Perhaps for that reason, "[t]he State did not appeal [the 1984] decision . . . and that holding is not challenged here." Brief for Petitioners at 7, n.8. The parties were then ordered to propose remedies for the constitutional violations the district court had found. 593 F.Supp. at 1506.

At the remedy stage, all parties, including Missouri, proffered remedial plans that involved educational enhancements. "Both the State of Missouri and the KCMSD have proposed program components designed to increase student achievement . . . ." *Jenkins v. Missouri*, 639 F.Supp. 19, 25 (W.D.Mo. 1985). For example, "both the State of Missouri and the KCMSD endorse[d] achieving AAA status [a state evaluation of the quality of education], reducing class size at the elementary and secondary level, summer school, full day kindergarten, before and after school tutoring and early childhood development programs." *Id.* at 26. Moreover, at least one of these programs, achieving AAA status, was proposed by Missouri as well as the KCMSD "to regain and maintain a quality education program . . . [and] to assist in attracting and maintaining non-minority enrollment." *Id.* at 27.

In determining which plans to adopt, the district court made clear that its "goal [was] the elimination of all vestiges of state imposed segregation." *Id.* at 23. The court acknowledged that its "broad equitable powers" were limited by "the nature and scope of the constitutional violation, the interests of state and local authorities in managing their own affairs consistent with the Constitution, and insuring that the remedy is designed to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.* at 23. Pursuant to those broad but limited powers, the court accepted some proposed pro-

grams and rejected others. In some instances, such as the early childhood development program, the district court rejected the KCMSD plan and accepted that proposed by Missouri. *Id.* at 32. In making its decisions, the court repeatedly stated that its goal was to "to improve the academic achievement of students within KCMSD, both as a remedial measure and to maintain and attract non-minority enrollment . . . . " *Id.* at 31. Recognizing its obligation to consider alternative remedial measures, however, the court adopted this approach only after concluding that "mandatory student reassignment" would not be effective. *Id.* at 38.

Missouri did not challenge many of these orders on appeal. *Jenkins v. Missouri*, 807 F.2d 657, 682, 683 (8th Cir. 1986). For example, Missouri did not challenge the order requiring that AAA rating be achieved throughout KCMSD, regardless of whether it affected non-minority children as well as minority children. Similarly, Missouri did not challenge the goal identified by the district court -- namely, to improve educational achievement in order to remedy past harm to achievement and in order to attract non-minorities into the district. Instead, Missouri focused its appeal on those aspects of the district court's remedial plan that the state, alone, was required to finance. *Id.* at 682. In an *en banc* decision, the Eighth Circuit adjusted some of the funding formulas to reassign more of the costs to KCMSD. However, the Eighth Circuit unanimously affirmed the propriety of an educational enhancement remedy in this case. *Id.* at 682-86. In addition, the court of appeals expressly rejected arguments that one part of the remedy (voluntary interdistrict transfers) was, in part, imposing "an interdistrict remedy for an intradistrict violation." *Id.* at 683.

Despite the Eighth Circuit's 1986 rulings, the district court found that for the following seven years Missouri "opposed the implementation of any program offered to desegregate the KCMSD . . . ." *Jenkins v. Missouri*, Order, April

16, 1993, at 2. The district court further noted that "the State has *never* offered the Court a viable, even tenable, alternative and has been extremely antagonistic in its approach to effecting the desegregation of the KCMSD." *Id.* (emphasis in original).

In 1992 and 1993, Missouri opposed the continuation of some of the education programs ordered by the district court. The district court largely rejected that opposition and the court of appeals affirmed. *Jenkins v. Missouri*, 11 F.3d 755 (8th Cir. 1993). The court of appeals noted that the goal of educational improvement to remedy past educational deficits and attract non-minority students had been set in the liability and remedy orders. *Id.* at 759. The court of appeals also concluded that the district court had implicitly found that vestiges of segregation remained in KCMSD and it affirmed that finding as well. *Id.* at 762. As the Eighth Circuit observed in its 1993 decision: "The only evidence before the district court with respect to the degree of progress on elimination of vestiges of past discrimination was at best that a start had been made." *Id.* at 765. Finally, in "a few further words," the court of appeals noted that the appropriate measure of any desegregation remedy is its effectiveness in eliminating the vestiges of segregation. *Id.* at 765-66.[2]

In a petition for *en banc* review, Missouri argued that the court of appeals had set a new and improper goal by insisting that test scores in KCMSD must reach some unspecified level for unitariness to exist. *Jenkins v. Missouri*, 19 F.3d 393 (8th Cir. 1994). Significantly, however, the authors of the panel opinion rejected that interpretation of

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[2] The district court and the court of appeals also addressed Missouri's objections to ordered salary increases for KCMSD personnel. *Amici* do not address this portion of those orders.

their prior decision, which they construed as holding only that test scores were *a* relevant criterion in measuring the effectiveness of a desegregation remedy. *Id.* at 395.

Meanwhile, the district court began the process of providing for the orderly termination of this case. Order, April 16, 1993. The court found that as a result of the desegregation remedies in this case there had been "substantial progress toward desegregating the schools." *Id.* at 8. The court also found that "there has been a trend of improvement in academic achievement in the KCMSD" but that more was practical and feasible. *Id.* at 11. In response to additional programs proposed by both KCMSD and plaintiffs, the district court noted that "it is time that the District be subject to a very definite reality check" and that the district could simply not "dream" up new programs. *Id.* at 13. Accordingly, KCMSD was ordered to provide a plan for funding education in Kansas City when "the court ordered funding would be withdrawn." *Id.* at 21. Thus, contrary to the impression conveyed by Missouri, this case now comes before the Court as it is moving toward its conclusion.

SUMMARY OF ARGUMENT

In the district court and the court of appeals, and to a large extent in its petition for *certiorari* in this case, Missouri relied primarily on its claim that it had eliminated all vestiges of segregation that it had caused because it had provided sufficient funds to Kansas City to make expenditures at least as high as in surrounding districts. That, Missouri argued, was all it had to do. Although in those courts, and in this Court, Missouri purported to be arguing a simple application of existing law, the argument was instead a fundamental challenge to the long-established principle of *Brown v. Board of Education*, 349 U.S. 294 (1955)(*Brown II*), *Green v. School Board of New Kent County*, 391 U.S. 430

(1968); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and other cases that compliance has been achieved not when a remedy has been instituted but when that remedy has been effective.

In its brief on the merits in this Court, though Missouri still professes to be simply applying existing law, it goes even farther in a fundamental challenge to the entire structure of desegregation law. The district court found that segregation had caused a drop in educational achievement. Missouri and all other parties had initially proposed remedies designed to improve educational achievement and to attract additional non-minority students. The district court found that those remedies were working in eliminating the vestiges of segregation and attracting non-minority children. Missouri concedes that this conclusion was a reasonable one. Brief for Petitioners at 19, 21. Nevertheless, Missouri argues -- for the first time -- that the entire remedial concept in this case is improper as a matter of law. That remedy, Missouri notes, is designed to achieve two goals, to improve educational achievement and to attract non-minority children. Missouri challenges the legitimacy of both goals in this case.

Missouri's principal challenge is to the goal of improving educational achievement. It argues that educational deficits cannot, as a matter of law, ever be considered vestiges of segregation, a principle rejected in *Brown v. Board of Education*, 347 U.S. 483 (1954)(*Brown I*), and thereafter. It argues that nothing but the factors identified in *Green* can be considered a vestige, a principle rejected most recently in *Freeman v. Pitts*, 503 U.S. __, 112 S.Ct. 1430 (1992); *see also id.* at 1454, n.1 (Souter, J., concurring). Here, the district court specifically found that deficiencies in student achievement caused by segregation remain. Despite this finding, Missouri argues that because 40 years have elapsed

since *Brown*,[3] the Court should hold as a matter of law that, regardless of the evidence, no court can find vestiges of depressed achievement. If adopted, the principle that time has erased all vestiges of segregation cannot be limited to achievement. Taken to its logical limit, it would open up every school desegregation case to a motion to dismiss on the grounds that no vestiges can possibly remain as a matter of law.

Missouri also argues that the goal of attracting non-minority white children from private schools and from the surrounding suburbs is improper, as a matter of law, based on the principle of *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*), that an intradistrict violation cannot form the basis of a interdistrict remedy. In *Milliken I*, the Court held that parties, such as suburban districts, that had not violated the Constitution, could not be required to participate in a remedy to cure the violation. However, in *Hills v. Gautreaux*, 425 U.S. 284 (1976), the Court expressly rejected the interpretation of *Milliken I* that Missouri now advances. As the *Gautreaux* Court explained, the error of the district court in *Milliken I* was not in ordering relief that had effects beyond the borders of Detroit, but in ordering remedial actions by parties who were not found to have caused any violation. In this case, the remedy order may have effects beyond the borders of Kansas City, but it does not order actions by any parties other than those found to have violated the law. Missouri's argument would thus amount to a wide expansion of the *Milliken I* holding and an explicit overruling of *Gautreaux*.

Finally, Missouri argues that even if the goals of the remedy order are acceptable, the remedy order is broader

[3] As KCMSD notes in its brief, the remedy in this case was only fully implemented three years ago, not 40.

than necessary to cure the violations on several grounds. First, Missouri argues that the remedy is overbroad because it is expensive, a proposition contradicted by *Swann*. Second, Missouri argues that the remedy is overbroad because it benefits white children as well as minority children. This may be true but, as the district court noted, Missouri has failed to offer a practical method of achieving the twin goals of the remedy without affecting white children in the district. Third, Missouri argues that one of the measures to be used to determine compliance -- *i.e.*, that test scores must reach national averages -- is improper because it is unattainable and because it requires curing at least some educational deficits that were not caused by segregation. To the extent the lower courts were to hold that test scores must reach national averages, regardless of whether that improvement was necessary to cure constitutional violations, they would be in error, violating the causation principles most recently reiterated in *Freeman*. However, neither the district court and the court of appeals have so held. Rather, they have held that test scores are relevant in determining if all vestiges of depressed educational achievement have been eliminated. To hold that test scores are irrelevant, as a matter of law, because improvement is unattainable or for any other reason would not only reject the long-established principle that remedies must be effective, but would also have this Court definitively resolve questions of educational methodology best left, in the first instance, to the district courts after an evidentiary hearing.

Thus, although Missouri has couched its argument in the guise of application of existing law, it is instead a request for a radical revision of existing law. No reasons are suggested for this Court to reverse the long-standing principles of school desegregation law and none could be. The district court's most recent opinions in this case have shown its sensitivity to the need to bring this case to an end upon

elimination of the vestiges of segregation in KCMSD. This Court's intervention is not needed to accomplish that goal. More generally, lower courts throughout the country are bringing school desegregation cases to a conclusion, as evidenced by the decreased number of such cases and the increasing findings of unitary status. But, where district courts find that vestiges of segregation do remain, this Court should not hold as a matter of law that those district courts were wrong, and dismantle desegregation remedies that are proving effective. For this Court to do so would send a powerful and unfortunate signal that this Court has abandoned its demand that all state-imposed segregation end.

ARGUMENT

I. THE PRINCIPLES OF SCHOOL DESEGREGATION LAW ARE WELL ESTABLISHED

In 1954, in what is now recognized as one of this Court's finest moments, the Court held that segregation in schools on the basis of race was a violation of the Equal Protection clause of the Constitution. *Brown I.* From the very beginning, the Court acknowledged that one of the consequences of segregation had been a loss in student achievement. *Id.* at 494 (segregation retards the "educational and mental development" of its victims). The Court ordered segregation ended. The Court recognized that different methods of desegregation would have to be employed based on the different conditions in different areas of the country and deferred to district courts more knowledgeable of those conditions. *Brown II.*

In *Green v. School Bd. of New Kent County*, 391 U.S. 430, the Court reemphasized the need to tailor remedies to local conditions. *Id.* at 439; *United States v. Montgomery*, 395 U.S. 225 (1969). The Court also clarified two important principles in the area of school desegregation. First, segregation was to be eliminated in all of its manifestations "root and branch." 391 U.S. at 438. Student assignment was not the only manifestation, or vestige, of school segregation. Others existed and the Court identified some of them. *Id.* at 435. Second, the Court held that the measure of a remedy in school segregation was its effectiveness in curing the conditions of segregation. *Id.* at 439; *Raney v. Board of Education*, 391 U.S. 443 (1968); *Monroe v. Board of Commissioners*, 391 U.S. 450 (1968).

In *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, the Court addressed the scope of permissible remedies to cure segregation. The Court found that the district courts had "broad remedial powers" to cure segregation. *Id.* at 27. The Court found all of the remedies proposed within the court's authority.[4] The Court identified two limitations on the breadth of possible remedies -- the remedy must relate to a current condition of segregation caused by past segregation and it must be practical. *Id.* at 16, 31. The Court repeated its observations in *Brown* and *Green*: "In this area, we must of necessity rely to a large extent, as this Court has for more than 16 years, on the informed judgment of the district courts in the first instance and on the courts of appeals." *Id.* at 28. In *Davis v. Board of School Commissioners*, 402 U.S. 33, 37 (1971), the Court repeated that "a district court may and should consider the use of all available techniques . . . . The measure of any desegregation plan is its effectiveness." *Id.* at 37.

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[4] The Court explicitly held that it was not creating new principles applicable only to a school desegregation case. The remedial authority of the district courts in school desegregation cases was inherent in equity and "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." 402 U.S. at 15-16.

Therefore, the structure of school desegregation law as of 1971 had established three principles relevant to this case. First, the Court will, to a large extent, defer to district courts in their choice of remedies. Second, the district courts have broad discretion in framing a remedy so long as it is related to a current condition of segregation caused by past segregation and is practical. Third, the remedy adopted by the district courts has to be effective in curing the condition of segregation.

The remaining desegregation cases in the 1970's applied and reaffirmed these principles. Thus, in *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972); *Milliken v. Bradley*, 433 U.S. 267 (1977)(*Milliken II*); and *Hills v. Gautreaux*, 425 U.S. 284, the Court approved a variety of judicial remedies because they were needed to cure conditions of segregation and would be effective. In *Wright*, the Court prevented a portion of a school district from withdrawing from the larger district because withdrawal would impede desegregation, would foster white flight, and would hurt the quality of education in the remaining portion of the district. 407 U.S. at 463-69. In *Milliken II*, the Court approved a plan requiring the State of Michigan to pay for educational programs until such time as "the remedial programs can help dissipate the continuing effects of past misconduct." 433 U.S. at 290. *Gautreaux*, though not a school case, applied the causation principle in upholding an order that HUD cure housing discrimination it had caused in Chicago by taking actions both inside and outside Chicago.[5]

[5] The same principle was followed in Milliken I;, *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976); and *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977)(*Dayton I*), where the Court rejected remedies that were not designed to cure segregation caused by the party to whom they were addressed.

In two liability cases in the 1970's, the Court again reiterated and applied these concepts to determine if a school board had eliminated all of the segregative conditions it had caused. *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979); *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979)(*Dayton II*). The Court re-emphasized several now well established principles. The Court held that a school district that had segregated must eliminate all of the segregative conditions it had caused to avoid liability. *Columbus*, 443 U.S. at 461. The Court held that any remedy must be effective. *Dayton*, 443 U.S. at 538. Finally, the Court held that remedial measures were not limited to student assignment. *Columbus*, 443 U.S. at 460.

In its two most recent cases, the Court has continued to apply the principles established in *Brown*, *Green* and *Swann*. Thus, in both *Board of Education v. Dowell*, 498 U.S. 237 (1991); and *Freeman v. Pitts*, 112 S.Ct. 1430, the Court reiterated that those who violated the law must cure any condition that flows from that violation -- any "vestige" -- but no more. The Court emphasized that the remedy must be measured by its effectiveness in eliminating the vestiges. *Freeman*, 112 S.Ct. at 1446. In addition, in *Freeman*, both the Court and Justice Souter in concurrence emphasized that vestiges of segregation were not limited to those identified in *Green*, but could involve other factors such as the quality of education. 112 S.Ct. at 1446, 1454.

II. MISSOURI'S ARGUMENTS, IF ACCEPTED, WOULD REPRESENT A RADICAL REVERSAL OF EXISTING LAW

A. Compliance With A Desegregation Remedy Is Measured By Its Effectiveness In Eliminating The Vestige Of Segregation, Not The Effort To Do So

The district court found that segregation in Kansas City had caused a deficit in educational achievement. *Jenkins*, 593 F.Supp. at 1492. This finding was fully consistent with this Court's finding in *Brown I* that segregation caused deficits in educational achievement. 347 U.S. at 494.

The court then imposed a remedy designed to cure the deficit. *E.g.*, *Jenkins*, 639 F.Supp. at 31. Additional educational resources were ordered for the purpose of curing the educational deficits that the court had found to be vestiges of segregation. *Id.* That order was fully consistent with this Court's finding in *Milliken II* that once a court found educational deficits that were vestiges of segregation, the court could order increases in educational resources for the purpose of curing the deficits. 433 U.S. at 278 (quoting the district court that the goal is to increase the "achievement level").

The district court in this case further found that the remedy it ordered was succeeding in curing the educational deficit that it had found to be a vestige of segregation. Order, April 16, 1993, at 8. At the same time, it found that it was practical and feasible to do more to cure the deficit. *Id.* at 11. The order that the remedy continue was thus fully consistent with this Court's repeated rulings that a remedy must eliminate the vestiges of segregation to the "maximum extent practicable." *See, e.g.*, *Davis*, 402 U.S. at 37; *Swann*, 402 U.S. at 26.

Missouri argues that it has cured the entire deficit, or

eliminated all vestiges, because it has provided additional educational resources. In effect, Missouri is arguing that it need not remedy the deficit in educational achievement, it need only try and that, even if it is unsuccessful in remedying that portion of the deficit that is a vestige of segregation, it should be relieved of further efforts.

This notion, that a defendant has fulfilled its duty if it has implemented a remedy, regardless of whether that remedy has eliminated all of the vestiges of segregation, has been repeatedly rejected by this Court. A defendant will not have fulfilled its duty until its actions have been effective in curing the violation. *Green*, 391 U.S. at 439 ("The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan . . . ."); *Wright*, 407 U.S. at 460-62; *Dayton II*, 443 U.S. 526-28 ("continuing duty to eliminate the effects of the system"); *Davis*, 402 U.S. at 33, 35, 37 ("The measure of any desegregation plan is its effectiveness"); *Monroe*, 391 U.S. 450; *Raney*, 391 U.S. 443.

It is surely relevant that Missouri has complied with the orders requiring it to increase educational resources. *E.g.*, *Freeman*, 112 S.Ct. at 1449. For this Court to hold that it is sufficient, even if it has been ineffective in curing the vestiges of segregation to the extent practicable, would require the Court to abandon one of the most well-established doctrines of desegregation law. Thus, Missouri's claim is not only not compelled by existing law, it is foreclosed.

B. A Goal Of Improving Educational Achievement As A Means Of Curing Educational Deficits That Were Vestiges Of Segregation Is Proper

Missouri's more fundamental challenge to the structure of desegregation law is its contention that deficits in educa-

tional achievement cannot be vestiges of segregation and, therefore, the goal of the court-ordered remedy in this case is improper.

Missouri appears to support its challenge by making two arguments. First, Missouri argues that the *Green* factors are the only elements of a school system that can be considered vestiges of segregation. The most recent and most explicit rejection of this argument was by Justice Souter in his concurring opinion in *Freeman*. Justice Souter wrote that "*Green*'s specific list of factors, of course, need not be treated as exclusive." 112 S.Ct. at 1454, n.1. The Court's majority agreed, holding that it was appropriate to address the *Green* factors and "to inquire whether other elements ought to be identified, and to determine whether minority students were being disadvantaged in ways that required the formulation of new and further remedies" including "quality of education." *Freeman*, 112 S.Ct. at 1446. These holdings were consistent with the entire line of school desegregation cases, including *Green* itself. *Green*, 391 U.S. at 435; *Swann*, 402 U.S. at 18-19 (quality of education as a vestige of segregation); *Wright*, 407 U.S. at 464 (quality of education); *Milliken II*, 433 U.S. at 278, 280-81 (educational deficits).

Missouri's second argument is that, as a matter of law, 40 years after *Brown I*, it is no longer possible to attribute any deficits in educational achievement to past segregation. In *Brown I*, this Court held that deficits in educational achievement were caused by past segregation. 347 U.S. at 494. Missouri argues that any deficits today are not vestiges of past segregation and need not be remedied. Missouri is correct in its assertion that, if existing educational deficits cannot be attributed to past segregation, the district court was without authority to order that they be cured. *Freeman*, 112 S.Ct. at 1445. To the extent that any current condition, whether student assignment or deficits in educational

achievement, cannot be attributed to past segregation, whether as a result of the passage of time or of some other factor, the district court is without authority to order remedial action in that area. *Id.* at 1448.

However, the district court in this case found just 10 years ago that as a matter of fact the then-existing deficits in educational achievement were caused by past segregation. *Jenkins*, 593 F.Supp. at 1492. Missouri does not challenge that finding. Brief for Petitioners at 7, n.8. In the intervening years, the district court has repeated the finding and it has been affirmed by the court of appeals. *E.g.*, *Jenkins*, 639 F.Supp. at 25, *aff'd*, 807 F.2d at 682-86. Thus, Missouri cannot argue, and is not arguing, that as a matter of fact in this case current deficits in educational achievement were not caused by past segregation. Instead, Missouri is arguing that in the 10 years since the liability finding in this case, the world has changed to a point where no court, under any circumstances, regardless of the evidence, could find current deficits in educational achievement were caused by past segregation.

In school desegregation, this Court has repeatedly indicated that it must rely in large measure upon the district courts to identify the sometimes subtle effects of segregation. In *Keyes v. School District No. 1*, 413 U.S. 189 (1973), the Court emphasized the subtlety of effects of segregation: "[A] connection between past segregative acts and present segregation may be present even when not apparent and . . . close examination is required before concluding that the connection does not exist." *Id.* at 211. For this reason, and because the district courts are more attuned to local conditions, this Court has historically and properly relied on the district courts to assess the present impact of past segregation. *Brown II*, 349 U.S. 294; *Swann*, 402 U.S. at 28 ("[W]e must of necessity rely to a large extent . . . on the informed judgment of the district courts in the first instance

and on the courts of appeals"); *Milliken II*, 433 U.S. at 287, n.18; *Columbus*, 443 U.S. at 469 (Stewart, J., concurring in part and dissenting in part). Missouri's suggestion would reverse that longstanding principle.

In addition, there is no evidence in the record to support the remarkable assertion that current deficits in educational achievement cannot have been caused by past segregation. There is also no evidence in the record that would distinguish deficits in educational achievement from other vestiges of segregation for these purposes. Thus, if Missouri's argument were to be adopted by this Court, it would jeopardize all school desegregation remedies.[6] Missouri's argument is not only not compelled by existing law, it is foreclosed.

C. A Goal Of Improving Educational Achievement As A Means Of Attracting Non-Minority Students Is Proper

The remedy in this case is designed not just to improve those deficits in educational achievement that are vestiges of segregation, but also to attract non-minority students into the

[6] In *Freeman*, Justice Scalia suggested that the 40 years since *Brown I* might at some time in the near future be the basis for re-examination of some of the principles of causation, such as the presumptions of *Swann*, *Keyes* and *Dayton II* and the burden shifting principles of *Columbus* and *Dayton II*. Missouri is making a far more radical suggestion. Missouri is suggesting that even if the burden were shifted to plaintiffs to reprove causation and even without any presumptions, a plaintiff could not, as a matter of law, establish causation. *Amici* would vigorously oppose the restructuring of desegregation law proposed by Justice Scalia but, because Missouri has not suggested it here, the Court need not reach that question.

Kansas City public schools.[7] In *Wright*, this Court expressly endorsed a remedy designed in part to attract non-minority students from private schools into the public schools. 407 U.S. at 464. The educational enhancements ordered by this district court are designed in part to do exactly that and are thus well within the discretion of the district court. Missouri does not cite *Wright* and only briefly mentions this portion of the remedial goal of attracting non-minority students.

Missouri argues that the portion of the goal that seeks to attract non-minority students from surrounding suburbs is, by definition, interdistrict. Because in this case an interdistrict violation was not found, Missouri argues that the goal is improper. Missouri relies on *Milliken I* which did hold that intradistrict violations would not justify interdistrict remedies.

The key to Missouri's argument is its view that any remedy that has any effect on any person beyond the school district at issue is by definition an interdistrict remedy. The key flaw in this argument is that it misunderstands the concept of an "inter-district" remedy. In *Hills v. Gautreaux*, this Court expressly rejected Missouri's definition of an "interdistrict" remedy.

> The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional viola-

[7] An additional purpose for the remedy in this case is to achieve intradistrict desegregation, a goal not challenged in Missouri's brief.

> tion . . . . Nothing in the *Milliken* decision suggests a *per se* rule that federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occurred.

425 U.S. at 296-98.

One portion of the remedial order in this case, that requiring Missouri to foster voluntary transfers of minority students to the suburbs, is directly analogous to *Gautreaux*, but that portion is not before this Court at this time. What is before the Court is the portion that requires Missouri and KCMSD to improve education in Kansas City to attract non-minority students. The suburban districts are not being restructured or indeed required to take any steps. Missouri is not even being required to take any steps "beyond the municipal boundaries" of Kansas City. Only wrongdoers are being required to act in this case and the only actions they are required to take are within the boundaries of Kansas City. This remedial order is simply not interdistrict within the meaning of *Milliken I* and *Gautreaux*. Missouri's argument to the contrary is not only not compelled by existing law, it is foreclosed.

D. The Remedy In This Case Is Not, As A Matter Of Law, Overbroad

This Court has held that the remedy in a school desegregation case must be tailored to the violations. *Dayton I*, 433 U.S. at 418. The district court in this case has acknowledged that requirement. It considered and rejected as impractical alternative remedies such as mandatory student reassignment. *Jenkins*, 639 F.Supp. at 38. It considered each and every program that was suggested to cure deficits in educational achievement, accepting those it found tailored

to that requirement and rejecting those it found not to be. *E.g.*, Order, April 16, 1993. The district court and the court of appeals have repeatedly found the challenged remedy in this case necessary and practical. *E.g.*, *id.* They have found other remedies unnecessary or impractical. 639 F.Supp. at 38, *aff'd*, 807 F.2d 657. Finally, they have found the remedy in this case is working. Order, April 16, 1993; 11 F.3rd at 765.

Nevertheless, Missouri asks this Court to rule that the remedy here is overbroad as a matter of law, even accepting the legitimacy of the goals that remedy is designed to achieve -- namely, improving deficits in educational achievement and attracting non-minority students. Missouri proffers three reasons in support of its overbreadth argument, none of which have merit.

First, Missouri argues that its expenditures have been so great that there must come a point when they are enough. If Missouri is suggesting that cost alone can be the basis for refusing a remedy, that suggestion is contradicted by *Swann* and other cases. If Missouri is suggesting that at some point the cost of a remedy becomes great enough, then the remedy can be abolished even though it has not yet been fully effective, that suggestion is contradicted by a long line of this Court's cases. *See* Section I above. If Missouri is suggesting that there are less expensive ways of achieving the goals sought by the court, that suggestion is particularly factual and should be addressed to the courts below. If there were less expensive, but still practical ways of achieving the goals in Kansas City and eliminating all vestiges of segregation, *amici* believe the district court would have an obligation to adopt those methods. However, Missouri does not suggest to this Court any less expensive ways of achieving the goals and, in the absence of any evidence on that question, it would be improper for this Court to hold that the district

court and the court of appeals were wrong as a matter of law.

Second, Missouri suggests that the remedy is overbroad because it affects non-minority children within the district who were not victims of discrimination. In at least two places, Missouri cries out that it "defies logic" to believe that segregation affected the achievement of non-minority students and thus a remedy affecting their achievement is overbroad. Brief for Petitioners at 22, 41. Given the district court's conclusion, unchallenged by Missouri, that segregation caused the KCMSD to provide inferior education to all of its children, it is hardly illogical to remedy that deficit for all of its children. More importantly, the remedy in this case is not based on a causal link between current deficits in educational achievement by white children and past segregation. The remedy is designed to improve the entire district so as to remedy the deficits of those children who were affected and to attract non-minority children. Assuming those goals are proper, as for this portion of the argument Missouri does, given the heavy minority enrollment in the district, and given the constitutional command that minority children not be segregated by race from non-minority children, it is difficult to imagine a remedy that would improve educational achievement for minority children only. This logic does not escape Missouri. Thus, for example, Missouri supported the expenditures necessary for Kansas City to receive an AAA rating even though the improvements made possible by those expenditures would affect non-minority children. Missouri offers no explanation for its argument that the current expenditures are somehow improper for affecting white children when the prior expenditures were required though they affected white children.

Finally, Missouri complains that the court of appeals has defined the standard of educational achievement that must be met before all vestiges are eliminated as achievement of national norms on standardized tests. This standard is improper, Missouri argues, not only because it goes beyond the violation (an argument addressed above), but also because it is unattainable. Test scores are affected by too many other factors, Missouri argues.

The court of appeals did not hold that attaining national norms on standardized tests will be the sole measure that will be used to determine whether all vestiges of the deficits in educational achievement have been eliminated. *Jenkins*, 19 F.3d at 395. The court held, unremarkably, that tests are one measure that the district court should use in determining the effectiveness of the remedy in eliminating the vestiges of segregation in Kansas City. *See* Section IIA above.

The Eighth Circuit judges who dissented from the denial of *en banc* review argued in part that, despite the rhetoric, no other measures of effectiveness were identified by the court of appeals and that therefore test scores would be the only measure. *Jenkins*, 19 F.3d at 396. Missouri repeats that argument here. In fact, the district court has discussed other measures it will use to determine if the tests defined in *Dowell* and *Freeman* have been met and all vestiges of segregation eliminated, including the racial composition of the schools. *Jenkins*, Order, April 16, 1993, at 8. Thus, no court has made test scores the sole factor.

More fundamentally, the Eighth Circuit dissenters and Missouri are seeking more rigid measures that can be used to determine when a vestige has been eliminated. This Court has resisted previous attempts to set rigid rules. Thus, in *Swann*, 402 U.S. at 24, the Court correctly rejected the idea that every school must precisely reflect the racial composition of every other school and that any school deviating from that principle was *per se* unconstitutional. More recently, in *Dowell* and *Freeman*, the Court rejected the idea that additional precision could be given to the concept of

unitariness (the idea that all vestiges of segregation have been eliminated). *Dowell*, 498 U.S. at 245-46. A large part of the rationale for the doctrine that in school desegregation cases the Court will rely heavily on the district courts is that no one desegregation plan and no one desegregation measure will apply to the many different circumstances presented by the thousands of school districts in this country. *E.g.*, *Green*, 391 U.S. at 439; *Wright*, 407 U.S. at 466. For this Court to attempt a precise measure of educational quality, applicable to all school districts, would place this Court much deeper into the "controversies over educational philosophy" than the remedy in this case. *See Missouri v. Jenkins*, 495 U.S. 33, 76 (1990)(Kennedy, J., concurring).

District courts and school districts are not without any guidance. The long-established principle set by this Court is that vestiges of segregation will be said to have been eliminated when the "condition that offends the Constitution" is corrected. *E.g.*, *Swann*, 402 U.S. at 16. If the court of appeals had held that KCMSD must meet national norms on standardized tests regardless of whether the difference between current scores and national norms was caused by segregation and regardless of its relationship to the need to improve educational quality to attract non-minority children, it would have erred.[8] The key is causation. *Freeman*, 112 S.Ct. 1430. The district court has wide discretion in issuing orders that correct conditions that it finds were caused by segregation. It may not correct conditions that were not. *Id.* Given the wide variation in school districts around the country, no further precision is needed or possible.

Missouri also appears to suggest that given the many

[8] Similarly, it would have erred if it had held that KCMSD must achieve "suburban comparability" regardless of the relevance of that standard to curing conditions caused by segregation. The lower courts did not so hold.

factors that influence the test scores of students, and given the wide variety of educational theories concerning methods to improve educational achievement,[9] improvement in test scores may be unattainable. The district court did not order improvements in education in KCMSD because the students there had a constitutional right to any minimum education.[10] It issued the orders to correct conditions it found to have been caused by segregation. The district court left the choice of a method of improving education to the community involved, *Jenkins*, 593 F.Supp. at 1506, and the method is fully supported by that community.[11] In addition, the district court has held that test scores are improving as a result of this remedy and that further progress could be made. Order, April 16, 1993, at 11. Thus, Missouri is asking this Court to hold, as a matter of law, that no remedial method will result in improvement in student test scores. For the most obvious reasons, such a ruling is neither warranted nor wise.

[9] See *Missouri v. Jenkins*, 495 U.S. at 76 (Kennedy, J., concurring)("A remedy that uses the quality of education as a lure to attract non-minority students will place the District Court at the center of controversies over educational philosophy that by tradition are left to this Nation's communities").

[10] *Missouri v. Jenkins*, 495 U.S. at 76 (Kennedy, J., concurring).

[11] The objections to the remedy come not from the local community but from the state, and those objections are based solely on cost, not on educational philosophy. *See Milliken II*, 433 U.S. at 295-96 (Powell, J., concurring).

CONCLUSION

The remedy in this case is undeniably expensive and extensive. It is tempting to suggest that there were surely other remedies, less expensive and less extensive that, in time, also would eliminate conditions of segregation in Kansas City. Strikingly, Missouri has not suggested an alternative in the district court and does not suggest an alterative here; it only asks that this remedy be abolished. For this Court to do that, it must repudiate the factual findings of the district court, affirmed by the court of appeals. It must repudiate much of the legal structure it has created since *Brown* to guide the lower courts in these cases. Were the Court to do so, it would send a powerful signal to this nation. This Court would be signaling that its determination to eliminate all of the evils of purposeful race discrimination in this country has ended. That the Court must not do. The decision below should therefore be affirmed.

Respectfully submitted,

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